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Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 2003

ED FINKELSTEIN, *pro se,* HELEN HERMAN, INC.,
A Delaware Corporation,
Petitioners,

v

CITY OF TUCSON and PIMA COUNTY, Arizona,
WILLIAM HAILE, and M/M EDWARD FLORENCE
Respondents.

On Petition for Writ of Certiorari
To the Arizona Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Ed Finkelstein
General Delivery
San Diego, CA 92138

45 pp

QUESTION PRESENTED

Whether summary judgment, which cannot be sustained on separate state grounds, violates the Takings Clause of the Fourteenth Amendment, the Full Faith and Credit Clause and Supreme Court precedents and falls under RICO statutes 18 U.S.C. 1961 et seq (forgery, fraud, extortion, conspiracy, obstruction of justice, interference with commerce).

RULE 29.6 STATEMENT

Helen Herman, Inc. (HHI) a Delaware corporation, has no parent companies and no wholly owned subsidiaries. I represent myself *pro se* and HHI in a verified derivative capacity in this Petition, pursuant to F.R.Civ.P. 23.1 and the First and Fourteenth amendments.

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(1) The City and County's frauds seriously hinder the effective administration of the law, jeopardizing private property rights;

(2) Arizona did not apply Delaware law to a Delaware corporation or recognize other state appellate decisions. One of the Court's functions is "to determine the nature and scope of obligations as between the States" under the Full Faith and Credit Clause;

(3) To accord the judgment with the unrefuted facts and make the Respondents accountable for their actions;

(4) Unlawful denial of housing raises issue of general public importance.

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OPINIONS BELOW

Pima County Superior Court denied jurisdiction of my constitutional taking claim on Sept. 21, 1998. Tucson City Court entered judgment on Sept. 22, 1998, for a "parking violation." On Jan. 10, 2000, the United States District Court for the District of Delaware (Case Civ. A. 00-541-GMS) denied jurisdiction. Pima County Superior Court entered Final Judgment on Dec. 15, 2000. Arizona Court of Appeals affirmed on Sept. 26, 2002 in an unpublished decision. I filed a Motion for Reconsideration, which the court summarily denied on Jan. 29, 2003.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. Sec. 1257(a). Final Judgment of the Arizona Supreme Court was entered on July 8, 2003, published as CV-03-0057-PR. No established procedure exists to file a motion for rehearing. *State ex rel. Nelson v. Jordan,* 104, Ariz. 193. A.R.S. Const. Art. 6, sec. 5; 17 A.R.S. Supreme Court Rules, rule 1. n. 1. Decisions of division of state supreme court become that of highest state court if petition for rehearing *en banc* is discretionary. *Teamsters Local 174 v. Lucas Flour Co.,* 369 U.S. 95, 98-101 (1962).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fifth and Fourteenth Amendments of the Federal Constitution and Art. II, Sections 4 and 17, of the Arizona Constitution guarantee due process and equal protection to protect private property rights, protections that the Arizona courts refused to provide. "No person shall be... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

The State also denied my First Amendment right to enjoy freedom of the press and expression without retaliation. (at 19.)

Art. IV, Sec. 1 provides: "Full Faith and Credit shall be given in every State to the public Acts, Records, and judicial Proceedings of every other State..."

Delaware Law Titles 8 (corporations), 10 (courts and judicial procedure) and 29 (state government) are quoted or cited in the text.

Art. VI, Sec. 2 (Supremacy Clause) and the Seventh Amendment (right to trial by jury) of the U. S. Constitution.

28 U.S.C. 1391(c): "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." A.R.S. 10-1501 (owning real estate without more is not doing business in Arizona.).

18 U.S.C. 241-246 (offenses against civil rights), 1503 (corruptly influencing judicial officer), 1515 (obstruction of justice), 42 U.S.C. Sec. 1983 (color of law) and 1985(2)(3) (conspiracy to violate civil rights), A.R.S. 13-2310 and 2311 (fraudulent schemes and artifices.) 18 U.S.C. Sec. 1961 (3)(4), *et al* (RICO statutes).

PETITION FOR WRIT OF CERTIORARI

Ed Finkelstein, representing himself *pro se*, and Helen Herman, Inc. in a verified derivative capacity (App. B), pursuant to Rule 23.1 F.R.Civ.P., petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals which the Arizona Supreme Court affirmed.

I. STATEMENT OF THE CASE

SUMMARY OF UNREFUTED FACTS

This case began in January 1998 when the City of Tucson granted me a temporary use permit (TUP), good for one year, to build residences and a school/cultural activities center on prime property I owned. The building was to have an office for my one-man newspaper, *The Arizona Examiner*, which is now defunct. But City refused to grant a build-

ing permit. City Court threatened me with six months in jail and $2,500-a-day fines for parking a construction trailer on my property without beginning construction.

Pima County Superior Court ruled that the City's "parking citation" was not a constitutional taking and remanded to City Court, which fined me $1,215, $865 over its limit. I was hospitalized with hypertension and pneumonia. (C.R. 95.)

I permanently lost all use of my property because the City followed the *criminal* "parking citation," which was in effect for one year, with an eminent domain action nine months later for a street-widening project.

In the eminent domain action, I fired my attorney for collusion, forgery and fraud. (Sec. B.) At the City's behest, Superior Court would not allow me to represent myself or Helen Herman, Inc. (HHI), a Delaware corporation, in a stockholders derivative action. (C.R. 101, 10/10/00 hearing.)

As a result, the court granted the City's Motion for Summary Judgment without considering the constitutional taking or *any* of my *unrefuted* facts, appraisal or constitutional claims (C.R. 95, 101).

The County supported the City, levied taxes for eighteen months *after* the constitutional taking and covered up the violations of my right to be heard by writing the Judgment, which claimed that my pleadings were considered. No mention is made that HHI was unrepresented.

HHI was a *de facto* corporation when I transferred title and I was living on the property when the constitutional taking occurred, but my creditors, whose claims I disputed, successfully moved, with the City's and County's support, to nullify my transference of title and my homestead.

The Arizona Court of Appeals fraudulently ruled, *inter alia*, that I did not file a counterclaim or a properly signed opposition to the City's summary motion. (Par. 24.) It refused to consider my claims on the merits and summarily denied my Motion for Reconsideration, which fully refuted the court's decision, which, I will show, was corrupt.

I claimed the constitutional taking in my complaint filed with the City, in City Court, in my Motion to Remove to Superior Court (at 1, 2 and 3) and my Counterclaim (at 1), *et al.* I raised my constitutional rights in numerous pleadings and at the Oct. 10, 2000, hearing (at 45). C..R. 36, 63, 85, 95, 96, *et al*) and in the two state appellate courts.

II. REASONS FOR GRANTING PETITION

(1) The City, County and State flouted the Constitution. Review is direly needed to reestablish private property rights, due process, the First Amendment, decisions of this Court and the Full Faith and Credit Clause, to punish the Respondents for fraud, and accord the judgment with the unrefuted facts. *Thompson v. City of Louisville,* 362 U.S. 199, 203, 80 S.Ct. 624, 4 L.Ed. 2d 654 (1960) (Review granted where due process violations were "substantial" in depriving petitioner of property);

(2) This Court has often recognized that "informational literature" is protected by the First Amendment. Appellate courts punished me for publishing *The Arizona Examiner.* (At 19.) *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 418 n. 1, 91 S. Ct. 1575, 29 L.Ed.2d 1. 1971);

(3) Unlawful denial of housing raises issue of general public importance. *U.S. v. Hughes Memorial Home* (1975, WD Va) 396 F. Supp. 544).

The So-Called "Parking Violation"

A. City's Constitutional Taking Violated This Court's Decisions Enacted Into Arizona Statutes

The City committed a classic constitutional taking in January 1998, which it disguised as a "parking violation."

Applicable, therefore, is *First English Evangelical Church v. County of Los Angeles,* 482 U.S. 304 (1987), one of the Court's four decisions invoking the doctrine of inverse eminent domain that were enacted into Arizona Revised Statutes 9-500.13 (cities) and 11-811 (counties).

"Temporary regulatory takings which...deny a landowner of all use of his property are not different in kind from permanent takings..." (*First English,* at 314-322.) A.R.S. 41-1311. 5th and 14th amends. U.S. Const. Art. II, Secs. 4 and 17, Ariz. Const. *City of Yuma v. Lattie* (App. 1977) 117 Ariz. 280. ("City's denial of development proposal was uncompensated regulatory taking in violation of takings clause of the Federal Constitution's Fifth Amendment.") *City of Monterrey v. Del Monte Dunes*, 526 U.S. –9thCir., 143 L.Ed. 2d 882, 119 S.Ct., *et al.*

The Eminent Domain Action

B. City Took Possession With a Forgery

The courts excused, sanctioned and ratified a criminal "Stipulation for Immediate Possession" that the City fraudulently represented to Superior Court as a consent "between the parties." I filed unrefuted evidence that I *twice* ordered my lawyer *not* to sign the document. Arizona Court of Appeals, however, fraudulently ruled that I authorized my attorney to sign it (Par.8) and that HHI somehow signed it. (C.R. 38.) No one from HHI signed it, and the corporate seal is not affixed to it. Forgery and fraud are "serious crimes" under Arizona Supreme Court Rule 25.

Del. Code 29-9505(4) and Art. II, Sec. 17, Ariz. Const. require a condemner to pay "the agreed purchase price" or "just compensation" *before* an owner surrenders possession of real property. *Sende Vista Water Co., Inc. v. City of Phoenix* (App. 1980), 127 Ariz. 42, 617 P.2d 158.

Under A.R.S. 33-401 and 403, party conveying real estate must subscribe to its conveyance. *Bream v. N. Campbell Professional Building* (App. 1976) 26 Ariz. App. 381, 548 P.2d 1193. "The essential requirement for a sale of all the assets of a corporation is that the stockholders shall consent thereto." *Robinson v. Pittsburgh Oil Ref. Corp.*, 14 Del. Ch. 193, 126 A.46 (1924). Further, *only* I could bind the corporation, so my signature was required.

Under the doctrine, "ex dolo malo non oritur action," (no

action can arise out of fraud), no court will recognize rights as springing from an illegal agreement, or enforce such agreements; rather the courts will leave the parties where it finds them. *Western Union Tel. Co. v. Yopst,* 118 Ind. 248, 20 N.E. 222. *City of Phoenix v. McCullough,* 536 P.2d 230, 24 Ariz. App. 109, 80 ALR3d 1071. Rule 17(b) A.R. Civ.P. Del. Gen. Corp. Law 8-124(1). 42 U.S.C. 1983, 1985(2)(3).

The so-called "Stipulation" was not in the form required to convey real property (A.R.S. 33-402), so it is illegal and invalid under A.R.S. 33-417A. The Court of Appeals fraudulently cited *Wyatt v. Wehmueller,* 163 Ariz. 12 (Par. 8), which does not apply because *Wyat*t was not an action affecting real property.

Under A.R.S. 13-2311(A) any person who makes fraudulent statements, devices, etc. in the business of "any subdivision of this state" is guilty of a class 5 felony. But the courts would not address this matter. (Motion for Reconsideration and Petition for Review.)

C. City Based Summary Motion on a Fraudulent Appraisal, Lies and a Violation of a Court Order

The City based its motion for summary judgment (C.R. 82) on seven lies. I address two:

(1) The City misrepresented Judge Harrington's order of June 16, 2000, by claiming that he ordered me to "retain counsel for Helen Herman & Co., Inc. and that Plaintiff's counsel has the responsibility of advising the court and filing any appropriate motions in the event Mr. Finkelstein does not retain counsel for the corporation by that deadline."

The actual order was as follows:

"...if you [Finkelstein] can't find an attorney timely, *then this case at least with respect to the corporation, cannot proceed...*I suppose one of the possibilities is that the corporation would have to be dismissed or whatever... If an attorney has not appeared in 30 days, I'm going to put the burden on the parties to notify the Court of *that* and file whatever motions are necessary in *that* regard." *Judge Harrington then set a firm trial date.*

On October 10, 2000, Mr. Rash, the City's attorney, told Judge Borek, who replaced Judge Harrington:

"I have no recollection of the Court even mentioning divestiture of the property..." (at 33.) A.R.S. 13-2310-11A.

The City's summary motion blathers on:

"Defendants Finkelstein and Helen Herman & Co., Inc., by ignoring the court's order issued June 16, 2000[ ] have not set forth any market value of the Property...The property owner has the burden to establish the property's value in condemnation proceedings. Defendants Finkelstein and Helen Herman & Co., Inc. have not me [sic] their burden. Therefore, summary judgment is proper." (at 3.)

My attorney gave the City a copy of Jim Sanders appraisal, which the City acknowledged:

"We have a copy...I'm not going to agree it [the appraisal] be submitted at this time." (11/14/00 hearing.)

So the City knew that a genuine issue of a material fact existed under Rule 56 A.R.Civ.P. when it filed its summary motion. The courts abetted this fraud: (1) Judge Borek fraudulently ruled that the appraisal was not signed and did not admit it. It was signed on page 48; (2) The Court of Appeals denied my motion to admit the appraisal.

The County also supported the City's fraud. (C.R.97).

'Not in Pima County'

I could not get an attorney. No condemnation lawyer would advocate the constitutional taking or my civil rights claims, or take my case. "Not in Pima County," was the consensus. So, after consulting with my Board, I filed stockholders derivative pleadings, to which the City at first did not object (C.R. 77) waiving its right to deny the SDA. Rule 12(i), A.R.Civ.P.

I complied with the requirements for an SDA. I was the only stockholder at the time I brought the SDA. Thus, I "fairly and adequately represent[ed] the interests of the shareholders." Rule 23.1 A.R.Civ.P. (*Clairdale Enterprises, Inc. v. C.I. Realty Investors* (SD NY) 423 F. 257.) *Russell v.*

Golden Rule Min. Co. 159 P.2d 776, 63 Ariz. 11. "[S]tockholder may maintain suit on corporation's behalf."

"Corporation in ordinary sense is directly damaged by sale of corporate assets at inadequate price and has sole right as legal entity to maintain action **except where damage is directly to a stockholder...[then] he may prosecute cause to judgment without order of court**..." *Funk v. Spalding* 246 P.2d 184. *Russell, supra.*

Delaware Gen. Corp. Law, 8-327 provides that SDAs should be liberally construed to protect corporation. *Blasband v. Rales,* 971 F.2d 1034 (3d Cir. 1992.)

But the City's attorney corruptly advised Judge Borek:

"There's no doubt that they [stockholders] can hold a suit, but they still have to be represented by an attorney... Shareholder derivative suits...[are] not supposed to have a shareholder represent himself as the corporation... [T]he corporation must be represented by an attorney." (10/10/00 hearing.) 18 U.S.C. 1503 (corruptly influencing a judge.)

The City's Motion for Summary Judgment and Mr. Rash's statements are "fraudulent misrepresentations," as that term appears in Federal mail fraud statute, 18 U.S.C Sec. 1341, from which A.R.S. 13-2310 "proscribing fraudulent schemes and artifices was adapted": "deceitful statements or half-truths or even concealment of material facts." *State v. Haas* (1983) 138 Ariz. 413, 675 P.2d 673.

Thus, by allowing no representation by the corporation, the City, County and courts trampled on Due Process under the 14th Amendment and the fairness doctrine of *International Shoe Co. v. Washington* 326 U.S., 310 (1945). Under Del. Gen. Corp. Law 8-122(2), HHI, of course, had a right to participate as a party in the proceedings. 42 U.S.C. 1983.

Courts Fraudulently Misapplied a Key Authority

Superior Court and the Court of Appeals cited *Boydston v. Strole Dev. Co.* 193 Ariz. 47, 969 P.2d 653. (1998) to rule that I could not maintain an SDA and could not "appear in propria persona." (C.R. 101, at 2; Court of Appeals decision,

par. 10).) *Boydston* was *not* a derivative action. "Natural person can always appear pro per" (at 655). Since I was served as a "co-owner," I had the right to represent myself. Fundamental requirement of due process is opportunity to be heard. U.S.C. Const. Amend. 1. Art 2, Sec. 4, Ariz. Const. A.R.S. 12-1120 ("All persons claiming an interest in property or damages from the taking thereof... may appear, plead and defend.")

Courts Nullified All My Pleadings, Banning Due Process

Boydston, citing *Ramada Inns, Inc.*, 102 Ariz. 127, 426 P.2d 395, held that though "a corporation cannot appear without a lawyer...[a] reasonable opportunity should be given to parties to litigate their claims or defenses on the merits." ***Boydston* rejected the plaintiff's argument that a pleading by a non-attorney was a nullity** (at 656). *Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co.* (1945, DC Cal) 61 F. Supp. 62. ("Policy of courts is to dispose of lawsuits on their merits whenever possible.")

Citing Rule 8(e) A.R.Civ.App.P., *Boydston* held that a notice of appeal "shall be signed by the attorney, or, if the party is not represented by an attorney, then by the party."

Hegel v. O'Malley Ins. Co., 122 Ariz. 52, 593 P.2d 275 (1979). (No litigant may be deprived of opportunity to present proof against summary judgment.) But all my pleadings, filed for myself *pro se* and in the SDA, were opposed by the City and not considered by the court. (C.R. 95, 96, 102, 109, 115, 116, 135, *et al*),

City Committed "Condemnation Blight"

(2) City fraudulently claimed in its Motion for Summary Judgment that its appraiser, "Tom Baker," did "a complete appraisal of the Property according to the Uniform Standards of Professional Appraisal Practice [USPAP] and has concluded that the fair market value of the Property on the date of condemnation, June 23, 1998, is $55,000 [which the City contradicted in Interrogatory #12, where it claimed that

the property was worth $75,000.] This determination of the subject property's fair market value is undisputed by the property's owner, Helen Herman & Co., Inc." *Helen Herman, Inc. was not even present in the case!* As I stated, the City had a copy of Mr. Sanders' appraisal for $78,000.

City's Administrative Directive 4.02-1 requires that "[a]ll appraisals... must adhere to all provisions of the Uniform Standards of Professional Appraisal Practice [USPAP] and Title 28 A.R.S." 42 U.S.C. 1983.

Under Rule 1-4 USPAP, the appraiser *must* consider "anticipated improvements." *Uvodich v. Board of Regents,* 9 Ariz. App. 400, 406, 453 P.2d 299, 235 (App. 1969) (City is prohibited from impairing value as immediate consequence of its taking, called "condemnation blight," and is barred by constitutional provision which requires just compensation.) Del Code 29-9505.

City Predetermined Its Appraisal

Mr. Baker declaimed condemnation blight (appraisal at 4), but obeyed the City's instruction, which in effect ordered him to exclude from consideration the 42-ft. trailer, building materials and *obvious* preliminary construction that he saw when he inspected the property on March 16, 1998. This fraud is a violation of USPAP Standards Rule 2-3, which prohibits "the attainment of a stipulated result."

Standards Rule 1-4(c)(f)(h) required consideration of "basic projections of future rent and expenses" of anticipated improvements, e.g. the Income Approach to evaluation, which my appraiser, Jim Davis, the head banker at Charter Funding, used to appraise the property at $2.1 million. (C.R. 135.)

City did not refute Mr. Davis's appraisal.

"We don't have to answer," the City's attorney told the court. "Mr. Finkelstein ...should not be allowed to address the court....Mr. Finkelstein was [sic] no longer a defendant in this case." (10/10/00 and 11/14/00 hearings. C.R. 101)

Mr. Baker didn't compare the property *next door,* which

the City condemned for $750,000 just for the real estate; a nearby churchyard, half the size of my property, condemned for over $416,000; and remote desert scrubland condemned for $1.5 million. (Opposition, C.R. 85, *et al.*)

Pursuant to *Nichols* 4-12.1 and 5-18.11, and *Orgel* 1-11, two expert treatises, appraisals of schools and cultural activities centers are confined to the Income Approach.

Thus, the City filed no ethical, legal and substantive evidence of value, but Superior Court denied my motion to strike the City's fraudulent appraisal (C.R. 88). In its answer, the City misrepresented *Boydston, supra* and fatuously stated, "[t]here is no basis in law or fact to support Defendant's Motion to Strike Plaintiff's Appraisal." (C.R. 92, at 2.) *Pac. G&E Co. v. Zuckerman* (1987) 189 CA 3 1113, 1134-1136, 234 CR 630, 642-644. (Party's expert "disregarded pertinent information" to arrive at value, so appellate court properly vacated judgment.)

Hope v. Valley City Salt Co., 25 W. Va. 789. (Grossly inadequate price is "almost conclusive evidence of fraud.") 18B Am Jur 2d Sec. 1769.

D. City Took 25% of Property Free and Hid Its Lack of Evidence Behind a Wall of Fraud & Due Process Abuse

Mr. Baker brazenly gave the City 25% of my property free to raise the zoning, which was unnecessary to build residences and a cultural activities center; then he falsely assumed, in violation of Standards Rules 2-2 (g) and 2-3, that I would sell the property rather than develop it. *Phoenix Title & Trust Co. v. Arizona Public Service Co.* (1968) 8 Ariz. App. 221, 445 P.2d 169. ("Condemner was required to pay for entire right appropriated.") 42 U.S.C. 1983.

The City's Motion for Summary Judgment violated ***every*** requirement of Rule 56(c) A.R.Civ.P. The City provided (1) no specific facts in support of the motion with reference to the record; (2) no memorandum and affidavits served within five days of my Opposition; and (3) no showing that there was no issue of a material fact and that the City was entitled

to summary judgment as a matter of law.

Rule (3.1) Pima County Local Rules required the City to set forth "all specific portions of statutes and authorities relied on...*in haec verba* and in quotation marks. Otherwise they will not be considered by the court."

The City skipped these due process requirements for one obvious reason—it could not support a single element of its claim. In short, it had *no* bona fide evidence—a fact that it hid behind a wall of bluster and deceit.

Rule (3.2) Local Rules required the City to serve a reply memorandum within 10 days of my opposition. It did not.

City held no negotiations, no hearings on my damages (A.R.S. 12-1116C. Del. Code 29- 9502), moving expenses and relocation benefits (A.R.S. 11-963, 964 and 966), litigation costs caused by the inverse eminent domain/ constitutional taking (A.R.S. 11-972; Del. Code 29- 9504), my prior appropriation of my property for a greater public use. (A.R.S. 12-1112[3]), payment for the construction trailer (A.R.S. 12-1122A.1, Del Code 29-9506(b), etc.), the City's violations of "statutory conditions precedent" *Town of South Tucson v. Tucson GEL& P Co.* (C.C.A. 1945) 149 F. 2d 847, and, contrary to the Court of Appeals' fraudulent claim of "lengthy discovery" (Par. 3.), the City allowed me no discovery.

I had a right to expect strict compliance with the form and practices laid down by law under the Equal Protection Clause of the 14th Amendment. 42 U.S.C. 1983.

Due Process Violations Precluded the Taking

The power of eminent domain is predicated on rigorous constitutional tests of due process and equal protection, paying just compensation and damages, and complying with "statutory conditions precedent." *Town of South Tucson, supra.* The power to condemn is not a shield against 1983 claims or inverse eminent domain. *(First English, supra. Monell v. Dept. of Soc. Serv. of City of N.Y.* 98 S. Ct. 2018.

Restrictions on state power are imposed under Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

Compensation, under Arizona Const. Art. 2 Sec. 17, must be "ascertained by a jury, unless a jury be waived ..."

I did not waive my right to a jury.

"Both fairness and equity must be considered in awarding compensation." *Yaist v. U.S.*, 17 Cl.Ct. 246.

The County thrust its full support behind the City. (10/10/00 hearing. C.R. 97.) 42 U.S.C. 1983 and 1985(2)(3).

E. State Courts Overruled *International Shoe* and 28 U.S.C. 1391(c) to Illegally Obtain Jurisdiction Over HHI

Arizona had no jurisdiction over HHI, a corporation chartered in and existing under the laws of the State of Delaware that never did *any* business in Arizona and which the City did not serve. *International Shoe, supra.* Sec. 1391(c).

"Foreign corporation not complying with state laws or doing business in state cannot be brought within state courts' jurisdiction by serving summons on its agents therein..." *Wells Fargo & Co. of Mexico, S.A. v. McArthur Bros. Mercantile Co.* (1933) 42 Ariz. 405, 26 P.2d 1021.19 C.J.S 952.

Test of whether foreign corporation is doing business in a state requires "a greater quantum of business activity" than for personal jurisdiction. Del.—*Coyle v. Peoples*, Super., 349 A.2d 870, 372 A.2d 539. 19 C.J.S. Corporations at 563.

But Superior Court ruled that applying for a building permit was sufficient contact to give Arizona jurisdiction over HHI. (C.R. 87, at 4.) The court cited no authority, in effect invalidating *International Shoe*, and A.R.S. 10-1501B9, B.10:

"Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature" does not give Arizona jurisdiction of a foreign corporation. Owning real estate without more is not doing business in Arizona.

F. Court Illegally 'Dissolved' HHI

Superior Court fraudulently held that *Gemstar, Ltd. v. Ernst & Young.* 185 Ariz. 493, precluded applying Delaware law in Arizona. (C.R. 87, at 2.) *Gemstar clearly* held that the "local law of state of incorporation will be applied to determine issues involving rights and liabilities of a corporation." *Bache v. Bache* (1977) 33 Ariz 45, 262 P11. "Court will take judicial notice of statutes of another state." Art. IV, Sec. 1.

Superior Court "dissolved" Helen Herman, Inc., which can only be dissolved under the laws of Delaware (Del. Corp. Law 8-106), to pay *my* creditors' fraudulent claims from the condemnation proceeds. The court likened a *de facto* corporation to the fictitious person that *never* existed in *Melni v. Custer,* 162 Ariz. 153, 781 P.2d 631 (App. 1989) when I transferred title to it. (C.R. 140.) The City stated: "We've seen no evidence of a de facto corporation..." 18 U.S.C. 241-246 (offenses against civil rights). 42 U.S.C. 1983 and 1985(2)(3). 18 U.S.C. 1503.

A *de facto* corporation is *not* a fictitious person. A corporation has *de facto* status if a *bona fide* effort is made to incorporate and all requirements of incorporation are fulfilled, as here. *Rice v. Sanger Bros.* (1924) 27 Ariz. 15, 229 P.297. A corporation does not acquire existence *only* if its articles of incorporation are never filed. *In re Johnson-Hart Co.,* 34 F.2d 183, one of the cases that the Florences' attorney misrepresented. Del. Corp. Law 8-124 ratifies preincorporation acts.

"Corporate existence of corporation de facto cannot be inquired into collaterally. It is only by quo warranto proceedings in the name of the State [Delaware] that its right to exist can be determined." *Wilmington City Ry. v. Wilmington & Brandywine Springs Ry.,* 8 Del. Ch. 468, 46 A. 12. Applicable Rule 81 F.R.Civ.P. was not applied.

By unilaterally "dissolving" HHI, the Arizona courts illegally intervened between my and HHI's contract with the State of Delaware protecting the property. The charter of a corporation is a contract between the corporation and its

State of incorporation *inter sese. Voege v. American Sumatra Tobacco Corp.*, 241 F.Supp. 369 (D.Del. 1965). *Lawson v. HFC.* 17 Del.Ch. 343, 152 A 723. Art. IV, Sec. 1. Const.

Arguendo, a dissolved foreign corporation cannot maintain an action in the courts of a state other than that of its creation. *E.F. Kirwan Mfg. Co. v. Truxton* 44 A.427, 18 Del. 48. No Arizona statute provides for the subjection of property in the state belonging to a dissolved foreign corporation. 42 U.S.C. 1983.

G. Laws on Service on Corporations Are Strictly Applied

Under Delaware Gen. Corp. Law 8-321, "[s]ervice of legal process upon any corporation in this State shall be made by delivering a copy personally to any officer or director of the corporation *in this State* [Delaware], or the registered agent of the corporation in this State [Margaret A. Landis]...or the Secretary of State." (Emphasis added.)

Or service may be effected under Del. Gen. Law Sec. 10-3111(b): "In any action against a corporation whose officers reside out of the State, process may be served by publishing the substance thereof in a newspaper of this State [Delaware] and of the state where the head officer resides."

Only Haile complied. Service of process upon a foreign corporation *must* comply with the statutes providing for such service. 19 C.J.S. Sec. 941. *Sullivan v. Canadian Pac. Ry. Co.*, D.C. Mass., 22 F. Supp. 95, *et al.* "In order for an out-of-state corporation to have waived its constitutional rights of due process in respect to service of process, it must have intended to waive such rights." *A.A.R. Realty Corp. v. United States Fire Ins. Co.,* Del. Super. Ct. 335 A.2d 271 (1975). 42 U.S.C. 1983.

Finally, HHI's corporate seal was not affixed to the complaint. "Corporation answers complaint under its corporate seal, that being the most solemn form of authentication which it is capable of adopting." *Hopper v. Fesler Sales Co.*, 11 Del. Ch. 255, 100 A. 791 (1917).

But Superior Court ruled that service on me was service

on HHI (C.R. 87, at 3), a false claim because Rule 4, A.R. Civ.P. applies only to a foreign corporation "qualif[ied] to conduct business in Arizona." (See. n. 14.) There is a presumption of corporate separateness (*Douglas Corp. v. Greyhound Corp.*, Del. Super. Ct., 304 A.2d 309 [1973]). City served me only as "co-owner" but stopped my defense.

If the court were to apply Arizona law, then Rule 4(i) A.R.Civ.P. required service on HHI within 120 days after the filing of the complaint. *Lycoming Division of Avco Corp. v. Superior Court of Maricopa Cty.*, 524 P.2d 1323, 22 Ariz. App. 150. (Judgment void without service.) 42 U.S.C. 1983.

H. My Summary Motion Was Unrefuted

Superior Court denied my unrefuted Motion for Summary Judgment, which was backed by my expert's appraisal that the property was worth $2.1 million based on the thwarted construction, the property's central location on a major arterial near the University of Arizona, current rentals and the area's low vacancy rate. (C.R. 135.)

Statements of fact submitted with summary judgment motions based on discovery citations, when not countered with contrary statements and discovery citations at the trial court level, are accepted as facts by the appellate courts. *Gordiner v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 167 n.2 742 P.2d 277, 278 n.2 (1987), *et al.*

The Court of Appeals exposed its predilection to decide fraudulently by claiming that I didn't file a summary motion and that my Opposition was "woefully inadequate." (Par. 13.) My Opposition/ Motion for Summary Judgment and Inverse Eminent Domain are the *same* document. (C.R. 85.) *Celotex Corp. v. Catrett* 477 U.S. 317. (A mere scintilla of relevant evidence will defeat a summary motion.)

I. Judgment Conflicts With This Court's Precedents And State Appellate Decisions: GA, N.J., MA. Del., MI

Where "development had been definitely planned... and would have been carried out but for the taking" evidence of

estimated future rentals are admissible "according to its highest and best use prior to condemnation." *U.S. v. 25.406 Acres of Land, etc.* 337 U.S. 931, 69 S. Ct. 1496 [1949]. *United States v. Waterhouse* 132 F.2d 699. *Church of Holy Cross v. City of Scottsdale*, 132 Ariz. 416, *et al.*

In *Georgia Power Co. v. Cole,* 234 S.E.2d 382, the defendant testified that prior to the taking he had "*investigated* mobile home park development costs [so] evidence concerning [the property's] possible use would be relevant to a determination of value at the time of taking." I did more than just investigate, I *began* development. 42 U.S.C. 1983. Art. IV, Sec. 1, U.S. Const.

In contrast to the City's abuse and fraud, governments in Delaware, Massachusetts, Michigan and New Jersey, must turn "square corners" in condemnation proceedings, for example, *FMC Stores Co. v. Borough of Morris Plains,* 100 N.J. 418, 495 A.2d 1313 [1985], *City of Dover v. Cartanza*, 541 A.2d 580 (Del. Super. Ct. 1988) Delaware Code 29 Sections 9501-06 (1992), the Real Property Acquisition Act). They must negotiate in good faith (*Central Industrial Park Project v. Goodwill Community Chapel*, 177 Mich. App. 11, 441 N.W.2d 27. [1985]); and not commit "condemnation blight." (*Pheasant Ridge Association v. Town of Burlington*, 399 Mass. 771, 506 N.E.2d 1152 [1987]), *et al.*

J. RICO Statutes Cover Respondents' Ongoing Crimes

Under the doctrine of "enlargement" (*Dewey v. Des Moines,* 173 U.S. 193, 197-198, 19 S. Ct. 379, 43 L. Ed 665. 1899), the Court may review the Respondents' infractions both individually and under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. 961 et seq. *Schlesinger v. Councilman,* 420 U.S. 738, 743, 95 S. Ct. 1300, 43 L. Ed. 2d 591. (1975) (Important issues not raised below sufficient to warrant certiorari review.) *Monell, supra,* at 2020, 2035-2036 (Ongoing misconduct exercised as with the force of law is prohibited.) The City of Tucson is the equivalent of New York's Tweed Ring in the 19th Century.

In *United States v. Clark*, 646 F2d 1259 (1981), the court applied the RICO Statutes broadly, as Congress intended, to municipal corporations.

Two predicate acts comprise existence of RICO enterprise. *Cullen v. Margiotta* (1987, CA 2 NY) 811 F2d 698, 483 US 1921, 97 L Ed 2d 764, 107 S Ct 3266.

Thus, RICO applies to *all* the Respondents. (C.R. 134.)

Florence and Haile used fraud: Haile was paid in full by an insurance firm and claimed a *de facto* corporation is a non-existent *person*, fraudulently citing *Melni, supra.* The Florences filed no compulsory counterclaim under Rule 13(a) A.R.Civ.P. It was later concocted by their attorney. He used a so-called "motion in limini" (C.R. 113) to strike my inviolable homestead. (The dwelling I planned for myself should also have been protected because I am physically disabled under 42 U.S.C. Sec. 3602h.) Haile and the Florences' frauds were fully supported by the City (11/14/00 hearing) and County, which wrote the Final Judgment. 42 U.S.C. 1983, 1985(2)(3). 18 U.S.C. 1503.

Writ of garnishment is the proper procedure when judgment debtor owns shares in corporation. A.R.S. 12-1572.2d. Judgment is "merely evidence of debt and must be reached by garnishment, not execution." *Haigler v. Burson* (1931) 38 Ariz. 192, 298 P. 404. Further, Del. Gen. Corp. Law 8-145 indemnified me from the Respondents' disputed claims.

Two Respondents Filed No Briefs, Admitting Their Guilt

Haile and the Florences filed no answer briefs in either state appellate court, thereby admitting they committed class 2 felonies under A.R.S. 13-2310A. *Town of Cottonwood v. Evans* (App. 1971) 13 Ariz. App. 595, 480 P.2d 16.(C.R.78)

Pima County levied taxes for almost 18 months *after* the constitutional taking, claiming the latter had no effect on taxes. (Answer Brief, at 10.) The courts overruled four U.S.

Supreme Court decisions embodied in A.R.S.11-811. Sec. 9502 of the Del. Code *requires* cessation of taxes upon "the effective date of possession," i.e. the constitutional taking in January 1998.

K. Judge Retaliated for My Articles in *The Examiner*

William Brammer, the presiding judge of the Arizona Court of Appeals in Tucson, is the law partner of former U.S. Senator Dennis DeConcini. The name of the firm is "DeConcini, Brammer, McDonald, Yetwin & Lacy, P.C."

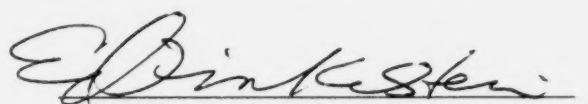
For years, my investigative reporting in *The Examiner* and political opposition roiled Sen. DeConcini. For example, I reported his use of inside government information to buy *inaccessible* desert wasteland, in a flood plain, that later was traversed *diagonally* by the pipeline of the Central Arizona Project. When I ran against him, I was arrested on an old, paid speeding ticket. Hundreds of my newspaper vending machines were vandalized. I was hit by a car.

Mr. DeConcini's fingerprints are on the proceedings below: DeConcini controls the Arizona judiciary through Judge Brammer, who heads the Pima County Judicial Selection Committee. Brammer also denied my appeals in the Haile and Florence cases. His retaliation for my articles violates my right to freedom of the press and expression. 1st Amend. Due Process and Equal Protection 14th Amend.

In *Wood v. Georgia*, 450 U.S. 261 (1981), the Court reviewed a state court decision that was fundamentally unfair due to a conflict of interest.

Here, the proceedings were a greater travesty due to Brammer's conflict of interest and to a *seasoned* criminality that flourishes in a protective environment.

I pray, therefore, that the Court will grant my Petition for Writ of Certiorari.



ED FINKELSTEIN, Petitioner *pro se*
Petitioner in derivative capacity for
Helen Herman, Inc

Sept. 28, 2003.

Appendix

Appendix Items A.

THE SUPREME COURT, STATE OF ARIZONA
July 8, 2003.
RE: CITY OF TUCSON v. EDWIN S. FINKELSTEIN, et al
No. CV-03-0057-PR
Court of Appeals Division Two No. 2 CA-CV 01-0029
Pima County Superior Court No. C-327369
GREETINGS:
The following action was taken by the Supreme Court of the State of Arizona on July 8, 2003, in regard to the above-captioned cause:

ORDERED: Motion for Costs [Appellant Finkelstein, Pro Se] = DENIED
FURTHER ORDERED: Appellant's Motion to Submit Appeal for Decision = Denied
FURTHER ORDERED: Appellant's Motion to Strike Response; Motion for Sanctions = DENIED
FURTHER ORDERED: Appellant's Petition for Review = DENIED
A panel composed of Chief Justice Jones, Vice Chief Justice McGregor and Justice Hurwitz participated in the determination of this matter. Record from Court of Appeals, Division Two, was an electronic link. Noel K. Dessaint, Clerk.
TO : Ed Finkelstein, Richard M Rollman, Richard A Brown And Scott Rash, Gabroy Rolllman & Bosse PC, Barbara LaWall, Pima County Attorney Attn : Thomas E.Burke, William M Haile, Jeffrey P Handler Court of Appeals Division Two, Lexis-Nexis West Publishing, Lib

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COURT OF APPEALS, STATE OF ARIZONA,
DIVISION TWO

CITY OF TUCSON, Plaintiff/Appellee, v. EDWIN S. FINKELSTEIN, a single man, aka EDWIN SOL FINKELSTEIN, aka ED FINKELSTEIN, Defendant/Appellees, WILLIAM HAILE, Intervenor/Appellee.	) 2 CA-CV 2001-0029) DEPARTMENT A)) MEMORANDUM) DECISION) Not for Publication) Rule 28, Rules of) Civil Appellate) Procedure))

Appeal from the Superior Court of Pima County
Cause No. C-327369. Honorable Ted B. Borek, Judge.

AFFIRMED

September 26, 2002

Gabroy, Rollman & Bosse, P.C., attorneys for Plaintiff/Appellee City of Tucson, Edwin S. Finkelstein, In Propria Persona, Barbara LaWall, Pima County Attorney by Thomas E. Burke, Attorneys for Defendant/Appellee Pima County Treasurer.

FLOREZ, Judge.

Par. 1. Appellant Edwin S. Finkelstein appeals the trial court's grant of appellee City of Tucson's motion for summary judgment that resulted in the City's successful condemnation of real property in which appellant claims an interest. The summary judgment also distributed funds from the condemnation award to appellant's personal creditors and others to whom appellant owed money. The notice of appeal states that appellant appeals from the judgment dated December 15, 2000, on behalf of himself and Helen

Herman, Inc. (HHI), a Delaware corporation of which he is or was a shareholder. Appellant is not a member of the State Bar of Arizona. Only duly licensed members of the State Bar may represent a corporation in the courts of this state. *Boydston v. Strole Dev. Co.*, 193 Aiz. 47, 969 P.2d (1998). Therefore, we address only those issues, as best we can discern them, relating to appellant personally.[1]

BACKGROUND

Par. 2 In 1996, appellant quitclaimed his interest in a parcel of real property to HHI, a corporation that, at the time, was nonexistent but which appellant incorporated in Delaware in 1997. He set about developing the property and received a temporary use permit from the City of Tucson to begin that process. The City, however, exercised its power of eminent domain to condemn the parcel, naming as defendants appellant, HHI, the clerk of the Pima County Superior Court, the treasurer of Pima County, and judgment creditors of appellant, Edward and Denise Florence. Later, a second judgment creditor, William Haile, was permitted to intervene in the lawsuit to file a lien against the parcel as well. Appellant and HHI were initially represented by counsel; during the course of the legal proceedings, however, their counsel withdrew and appellant and HHI did not employ a new attorney. Despite being told by the trial court that he could not represent HHI, appellant then began to represent himself and, ostensibly, HHI.

Par. 3 After lengthy pretrial discovery proceedings, the City moved for summary judgment. On November 14, 2000, the trial court entered an order designated "Third Amended Judgment" in which the court found that HHI owned the parcel, and that it owed $55,000 as just compensation for the parcel. On November 15, the trial court issued a detailed, unsigned minute entry, in which it treated as a motion for summary judgment Haile's motion, in which the Florences joined, to void the quitclaim deed by which appellant had sought to transfer title of the parcel to the then-nonexistent

HHI. In a December 15 judgment based on the November 15 minute entry, the trial court granted Haile's motion for summary judgment, declared void the quitclaim deed from appellant to HHI, and declared appellant personally to be the owner of the parcel. In that judgment, the trial court calculated the amounts due to appellant's personal creditors, to the clerk of the Pima County Superior Court for jury fees in an unrelated matter, and to the Pima County treasurer for delinquent and accruing taxes on the parcel.[2]

Par. 4 The court declared void the quitclaim deed from Appellant to HHI because HHI's incorporation documents had not been filed until 1997, several months after appellant had attempted to transfer the parcel to HHI. The court reasoned that, because appellant had conveyed by quitclaim deed his interest in the property to a nonexistent corporation, no delivery of the deed was made, and the purported transfer was a nullity. *See Melni v. Custer,* 162 Ariz. 153, 781 P. 2d 631 (App. 1989) (deed executed in favor of fictitious person is nullity). The trial court further reasoned that HHI could not have been a de facto corporation at the time the quitclaim deed was executed because to create such, the intended incorporators must have made a good faith effort to incorporate under the laws of the state in which the incorporation is to occur. *See Terrell v. Industrial Comm'n,* 19 Ariz. App. 468, 508 P.2d 355 (1973). Indeed, the trial court noted that appellant had "conceded" that no attempt had been made to file HHI's articles of incorporation until months after the quitclaim deed supposedly transferred title to HHI. As a consequence of the ineffective transfer, appellant was the owner of the parcel, and his personal creditors could attempt to satisfy their various claims from the proceeds of the condemnation award.

Par. 5 The issues in this appeal concerning the City were actually determined by the trial court's order dated November 14, 2000. Although that order is labeled a judgment and signed by the trial judge, it was not a final judg-

ment, *see Hill v. City of Phoenix*, 193 Ariz. 570, 975 P.2d 700 (1999), nor did it have the requisite language of Rule 54(b), Ariz. R. Civ. P., 16 A.R.S., Pt. 2, to make it appealable. However, in the signed December 15 judgment, the judgment actually appealed from the trial court affirmed its determination in the November 14 order as to the City. Thus, we address appellant's issues related to the City.

ISSUES

Par. 6. As best we understand appellant's brief, he raises four issues with various arguments related to the December 15 judgment. In this decision, we have condensed his many "issues" and "arguments" to the following issues: (1) the jurisdiction of the trial court to hear this matter; (2) the appropriateness of the grant of the City's motion for summary judgment, of Haile's motion to void the quitclaim deed from appellant to HHI, and the determination of the amounts due appellant's creditors; and (3) Haile's and Florences' use of judgment liens instead of garnishment. Additionally, appellant seeks various remedies in this court.

1. Jurisdiction

Par. 7 First, appellant raises the issue of the jurisdiction of the trial court to hear this matter. In this jumbled argument, he posits that the superior court was "[e]stopped" from exercising jurisdiction because, in 1998, the City took the property. Appellant does not cite to the record to support his assertion, nor does he present any argument related to the circumstance here. We are not inclined to do his work for him. *See United State v. Dunkel*, 927 F.2d 955 (7th Cir. 1991) (judges are not pigs hunting for truffles); *Brown v. United States Fidelity & Guaranty Co.*, 194 Ariz. 85, 977 P.2d 807 (App. 1998). Nonetheless, as best we can discern, he attacks the trial court's jurisdiction over HHI only. Because he cannot serve as an advocate on behalf of HHI, however, we do not address that argument. He does not attack the trial court's jurisdiction of him personally.[3]

Par. 8. Appellant also argues several other issues related to HHI; we do not address those. As to his insistence that he never stipulated to immediate possession of the parcel by the City, it is unclear whether appellant's assertions relate to him personally or as a representative of HHI, nor does he explain how they relate to the City's "taking" of his property in January 1998. To the extent the argument relates to appellant, personally, we note that the record contains a document headed, "Stipulation for Immediate Possession," signed by HHI and appellant's attorney of record at that time. The document states that, upon deposit of $47,800 with the clerk of the Pima County Superior Court, the City would be entitled to immediate possession of the property. Although appellant denies he stipulated to that result, he does not deny that his attorney's signature is on the document. Therefore, appellant was bound by the actions of his attorney to give the City immediate possession of the property. *See Wyatt v. Wehmueller*, 163 Ariz. 12, 785 P.2d 581 (App. 1989).

2. Summary judgment motions

Par. 9 Next, appellant argues that the trial court improperly granted summary judgment in favor of the City and the judgment creditors.[4] A trial court properly grants summary judgment when "the facts produced in support of the claim...have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We determined de novo whether any genuine issue of material fact precluded summary judgment and whether the trial court correctly applied the law. *Lavidas v. Smith*, 195 Ariz. 250, 987 P.2d 212 (App. 1999). We view the evidence in the light most favorable to appellant, the non prevailing party. *See Swanson v. Image Bank, Inc.*, 202 Ariz. 226, 43 P.3d 174 (App. 2002). A material fact is any disputed fact that could affect the result

of the action. *Hegel v. O'Malley Ins. Co.*, 122 Ariz. 52, 593 P.2d 275 (1979). The trial court's grant of the City's and Haile's motions for summary judgment settled the issues of the ownership of the property, the value of the property, the propriety of the condemnation itself, and the amounts due appellant's personal creditors and for unpaid taxes and jury fees.

Par. 10 Appellant insists that his "unrefuted" opposition, which we glean to be his appraisal, was sufficient to defeat the City's motion for summary judgment, including the issues of value of the parcel as reflected in the City's appraiser's affidavit. Appellant is wrong. First, his opposition to the motion for summary judgment was filed in behalf of the stockholders of HHI, and, as the court found, appellant signed the opposition on behalf of HHI.[5] Thus, the trial court was precluded from considering the opposition. *See Boydston*

Par. 11 Furthermore, even had the court considered his opposition, the unsigned and unverified "appraisal" that appellant had attached showed a value of $75,000, but did not state who the appraiser was or what parcel had been appraised. Thus, we reject appellant's argument here that his opposition was appropriate and established an issue of material fact to overcome the City's motion for summary judgment. We also reject his alternative argument that he was entitled to summary judgment because "(1) No service or jurisdiction of HHI; (2) Superior Court's *estoppel* of jurisdiction; (3) No showing of 'more necessary public use'; (4) unrefuted multiple civil rights violations; and (5) unrefuted that just compensation for the property is $2.1 million." Our review of the record does not reflect that appellant filed a motion for summary judgment in the trial court.

Par. 12. Our rejection of these arguments about his opposition to the City's motion for summary judgment, which opposition appellant signed on behalf of the

corporation only, moots the multitude of appellant's other arguments on appeal. These arguments include the accuracy of the valuation by appellant's "independent expert, Jim Davis," showing the "just compensation" for the parcel was $2.1 million; the fraudulent nature of the City's appraisal; the City's use of "expert swearers"; the City's violation of the eminent domain law as to its appraisal; appellant's designation of the parcel for public use; Arizona's lack of long arum jurisdiction over foreign corporate owners of land inside this state; the trial court's failure to apply Delaware law; the fact that his pleadings were rejected by the trial court; and the "unprofessional and unconstitutional" actions of the City's attorney.

Par. 13 Appellant does argue that, as owner of the parcel, he had a right to express his opinion on the value of the parcel. He is correct. "An owner may *always* testify as to the value of his property." *Town of Paradise Valley v. Laughlin.* 174. 484, 486, 851 P.2d 109, 111 (App. 1992). What appellant does not understand, however, is that, when he had the opportunity to respond to the City's motion for summary judgment, he failed to do so on behalf of himself and, even assuming his response was for himself personally, his proof was woefully inadequate.

Par. 14 Appellant next attacks the trial court's determination in its grant of summary judgment of the amounts owed his creditors, as discussed below, the treasurer and the clerk of superior court. Appellant's response to the City's motion, again, was solely on behalf of HHI. Assuming that appellant has a basis personally to argue this issue, we look at his argument to illustrate its baselessness. Appellant insists that he paid taxes for "18 months While the City Owned the Property!" In his brief, appellant states that Judge Harrington "ordered: 'City is liable for post-judgment [interest] from the date of the taking [and] interest from the date of taking."

Par. 15 Importantly, because it shows the disregard appellant has for the record and his lack of understanding of the legal process, the attorney for the City, not Judge

Harrington, made the statement appellant quotes. On April 29, 1999, the trial court signed an order for immediate possession of the property. Thus, the sentence in the trial court's order that the City owed appellant "interest at the statutory rate from April 29, 1999 until the date paid" clearly uses that date of immediate possession. Because appellant has misread the transcript as indicated above, none of his arguments and authorities supports his position. No one disputes that he would owe no taxes for the period after the Cty had taken possession of the property. That occurred April 29, 1999.The trial court's order of December 15, 2000, then set the amount of taxes as $2,008.91, together with statutory interest at the rate of $14.34 per month or partial month beginning December 1, 2000 until paid." The sum apparently derives from the affidavit of Lennie Leikem, a deputy treasurer in the Pima County treasurer's office and the supervisor of the delinquent tax department.[6] Leikem's affidavit provided adequate basis for trial court's ruling on the amount of taxes, penalties, and interest due. We also note that the appellant does not attack this affidavit on appeal, just as he failed to do in the trial court. Accordingly, this argument is wholly without merit. As for the amount of jury fees in an unrelated case, appellant does not argue that the amounts the court assessed are in error. Thus, we do not discuss these fees.

3. Creditors' remedies

Par. 16 In its December 15 judgment, the trial court set out the amounts due on the creditors' liens filed against the parcel. The Florences had recorded a lien against the parcel on July 28, 1998, arising from a judgment entered in Pima County Superior Court cause number 296691.The judgment was against appellant personally. Similarly, Haile had recorded a judgment against appellant in the Pima County recorder's office on October 8, 1998, at Docket #10898, pages 886-88. This judgment as also against appellant personally, "aka" HHI.

Par. 17. Appellant contends that his creditors' involvement in the condemnation action was a "fraud" because they were required to follow the "strict, separate prelimary [sic} procedures involving applications and writs, service on [appellant] and HHI of required documents, including shares held, answers, then posting of garnishment bonds," all to be followed by a hearing on his objections. Appellant relies on the collection procedures set out in A.R.s. 12-1570 through 12-1595 for garnishment. What appellant doe not understand is that garnishment is but one method to collect a judgment debt; his creditors chose to record their judgments pursuant to A.R.S. 33-961 through 33-968. Appellant has shown no legal basis for his assertion that the recording of the creditor's judgments was insufficient to establish their judgment liens, which the court then ordered paid from the condemnation proceeds to clear title of the parcel in the City.

Par. 18 Appellant also argues that property "Owned by Government Cannot Be Attached." Although this is a correct statement of the law, see *O"Leary v. Superior Court,* 104 Ariz. 308, 452 (1985), appellant fails to understand that it was to complete the condemnation process to provide the City with clear title that his judgment creditors' liens were paid from proceeds from the condemnation of the parcel. And, although appellant denies in his brief any liability for these debts, the record does not reflect that he had successfully challenged these matters or managed otherwise to reverse or satisfy the judgments that had been recorded by Haile and the Florences. This argument fails completely.

Par. 19. In its December 15 judgment, the trial court granted both the Florences and Haile interest on their judgments. Appellant argues that neither the Florences nor Haile was entitled to interest on their judgments because "<u>they did not ask for interest when they received their judgments[s] and none then was awarded</u>." However, despite appellant's statement that no interest was due, he has failed to point to any document in the record showing that

the trial court was wrong in assessing interest on each judgment. The record in this matter does include a certified abstract of Haile's judgment, which states that the judgment included interest on the principal amount at the rate of ten percent per annum from September 14, 1998.

Par. 20 As to the Florences' judgment, the record reflects that the judgment was entered against appellant for the amount of $5,750 plus taxable costs. Appellant is correct that the judgment itself did not award the Florences interest. What he overlooks is A.R.S. Sec. 44-1201(A), which provides that a judgment is subject to ten percent interest unless a different rate has been contracted for in writing. We reject appellant's argument that the trial court erred in calculating interest for each of these judgments in its December 15 decision.

Par. 21 Appellant then insists that the "'creditors' violated A.R.S. Sec. 33-967, which requires 'an attachment of a separate information statement' to their judgment claims." This argument consists of one sentence without elaboration or citation to the record. Thus, it fails pursuant to Rule 13(a), Ariz. R. Civ. P., 17B A.R.S. Moreover, as best we can discern, appellant raises this issue for the first time on appeal. Thus, we do not address it. *Moretto v.Samaritan Health Sys.*, 190 Ariz. 343, 947 P.2d 917 (App. 1997).

Par. 22 Next, appellant posits that HHI's de facto corporation status prevented the trial court from ordering the payment of his personal creditors' judgment liens from the proceeds of the City's condemnation of HHI's property. We have previously rejected appellant's argument concerning HHI's corporate status at the time he attempted to quitclaim the parcel to HHI. Thus, this argument fails completely.

Par. 23 Appellant then asserts that the trial court erred in refusing to consider his homestead exemption to protect the proceeds of the condemnation from his creditors. Appellant had recorded a designation of homestead exemption on the parcel before he incorporated HHI. During preparation for trial, he failed to state in pretrial disclosure his intention to assert this defense within the time for disclo-

sure, doing so only some fourteen days before trial. On the morning of trial, he finally produced a document to support his claim of a homestead exemption on the property. The trial court sanctioned appellant for this late disclosure by excluding the document. "Imposition of sanctions for Failure to make discovery is within the discretion of the trial court." *Fleitz v. Van Westrienen*, 114 Ariz. 246, 250, 560 P.2d 430, 434 (App. 1977). Appellant does not argue that the trial court abused its discretion by imposing the sanction against him; he argues only that the homestead exemption existed. We need not decide whether the homestead exemption existed because, whether it did nor did not, the unappealed sanction was for his "intentionally disregard[ing] discovery orders and provid[ing] no explanation for th[e] untimely disclosure."

4. Remedies on Appeal

Par. 24 Finally, appellant asks this court to award him damages from the City for its "harassment, threats, civil rights violations, illegal fines, fraudulent appraisal, pleadings and motion for summary judgment, fabrication of evidence and the emotional suffering it ruthlessly and needlessly inflicted, under color of law"; [appellant's and HHI's] business expenses (A.R.S. 11-961), improvements on the property (A.R.S. 11-973), moving, replacement and related expenses (A.R.S. 11-963, 964)"; damages from Pima County for "sanctions, restitution, and damages for conspiring and aiding the fraudulent 'creditors' to collect judgments against" appellant and for other perceived wrongs; and "sanctions, restitution and damages" from the Florences and Haile and their attorneys. These requests indicate clearly that appellant does not understand what the role of this court is nor what relief we may grant. Furthermore, we find no indication in the record that appellant ever filed in the trial court a counterclaim or a motion for summary requesting the relief he asks here. This is an appeal limited to the trial court's December 15 judgment, which

granted the City's motion for summary judgment and Haile's motion treated as a summary judgment.

Par. 25 Despite appellant's many statements, pleadings, and other papers, he has shown no genuine issue of a material fact that would have precluded the trial court's granting the City's motion for summary judgment, Haile's motion to void the quitclaim deed to HHI, and the attendant determinations of the amounts due the Florences, Haile, the clerk of the Pima County Superior Court, and the treasurer of Pima County.

Par. 26 Affirmed.

M. JAN FLOREZ, Judge

CONCURRING:
J. WILLIAM BRAMMER. JR., Presiding Judge
JOSEPH W. HOWARD, Judge.

Footnotes

1 Appellant attempts to circumvent the rule that a corporation must be represented by a duly licensed member of the State Bar of Arizona by asserting he is filing his pleadings on be- half of the stockholders of Helen Herman, Inc. Even if, as a stockholder, he can bring a stockholder's derivative action, he cannot pursue that action in his individual capacity on behalf of other stockholders, as he attempting to do here. *Boydston v. Strole Dev. Co.*, 193 Ariz.47, 969 P.2d 653. (1998)

2 Unlike the clerk of the Pima County Superior Court, appellees Florence and Haile have not filed answering briefs. We are permitted, therefore, to consider their failure as a confession of error. See Bulova Watch Co. v. Super City Dep't Stores of Arizona, Inc., 4 Ariz. App. 553, 422 P.2d 184 (1967). We are not required to do so, however. Nydam v. Crawford, 181 Ariz. 101, 887 P.2d 631 (App. 1994). Because appellant has raised no meritorious issue as to the validity and amounts of the Florences' and Haile's judgments, we decline to consider their failure to file answering briefs as a confession of error.

3 The record shows appellant was personally served with the summons and complaint in this matter.

4 In this section of his opening brief, appellant argues that the "City Gained Its Summary Judgment by Violating Judge Harrington's Order" and various rules. As we understand the argument, appellant posits that, because Judge Harrington set a firm trial date, "a trial would be held regardless of whether [appellant] obtained an attorney or, if [he] could not, then [Judge Harrington] would dissolve the corporation and allow [appellant] to represent [him]self." Thus, he reasons, the City's motion for summary judgment was "*in*appropriate" and Judge Harrington's statement "judicially *estopped*" the City from pursuing summary judgment. First, appellant has mischaracterized Judge Harrington's statements as reflected in the transcript of that hearing. The transcript shows that Judge Harrington simply remarked that he "suppose[d] one of the possibilities [wa]s that the corporation would have to be dismissed or whatever" if appellant could not "timely" find an attorney. Second, appellant simply does not understand that a firm trial date does not mean that a trial will occur, but simply that, if a trial is to occur, it will occur on that date.

5 Appellant argues that, because he is a stockholder of HHI, he could represent himself as a stockholder and, through that representation, the corporation; to this end, he asserts he filed a shareholder's derivative suit to represent HHI. Once again, he is wrong. A shareholder's derivative suit "is by its nature 'by or in the right of the corporation.'" *Hydro-Dynamics, Inc. v. Pope,* 146 Ariz. 586, 708 P.2d 70 (1985), *quoting* 19 Am. Jur. 2d *Corporations* Sec. 528; *see also Schroeder v. Hudgins,* 142 Ariz. 395, 690 P.2d 114 (App.1984). Appellant also failed to comply with Rule 23.1, Ariz. R. Civ. P., 16 A.R.S., Pt. 1, which sets out the requirements for derivative actions by shareholders.

6 This affidavit is an attachment to the Pima County treasurer's "Non-Opposition to [City]'s Motion for Summary Judgment." The affidavit states that the amount of delinquent taxes, penalties, and interest was $1,994.57 through October 2000. The interest was accruing at $14.34 per month. Thus, the trial court added $1,994.57 plus $14.34 to reach the sum of $2,008.91 due.

COURT OF APPEALS, STATE OF ARIZONA, DIV. 2
Feb. 18, 2003. Cause No. C-327369.

Appellant's Motion for Reconsideration of Motion to Include Appraisal in Record; Motion for Sanctions is Denied. Signed by Judge Brammer.

ARIZONA COURT OFAPPEALS, DIV. 2.
Jan. 29, 2003. My Motion for Reconsideration in Denied.Signed by Judge Brammer.

CITY COURT OF TUCSON. Complaint L004186, Docket 98245693. September 22, 1998. Respondent's motion to set aside the judgment of August 3, 1998, is denied, ordering me to vacate my property or the maximum fine $2,500 and six months in jail. Signed Laura J. O'Dwyer, City Court, Civil Infractions, Limited Special Magistrate.

TUCSON CITY COURT. Case L004186. Docket 98245693. CIVL MOTION CITY OF TUCSON. "Forfeiture of bond sufficient penalty. The attorney for The City of Tucson asks no further fines or criminal action." ORDER: "The abatement order of 8/3/98 remaining in effect for one year until 8/3/99 pursuant to T.C. 8-6.1(b).

ARIZONA SUPERIOR COURT, PIMA COUNTY
JUDGE: Charles V. Harrington. June 16,2000.

Granting my attorney's application to withdraw as counsel, giving me until July 17, 2000 "to retain counsel for Helen Herman & Co., Inc. Counsel shall have the responsibility of advising the Court and filing any appropriate motions in the event Mr. Finkelstein does not retain counsel for the corporation by that deadline." He then set a "firm" three-day jury trial for November 14, 2000. He denied the City's "motion to suspend accumulation of post-judgment interest."

ARIZONA SUPERIOR COURT, PIMA COUNTY JUDGE: Ted B. Borek. September 8, 2000.Ruling: Arizona Constitution Art. 14, Sec. 9, "Corporations Other Than Municipal", cited by the City as its authority to take the property, "does not authorize the exercise of eminent domain by a municipality" but allowed City to bring this action. Denied that under *Gemstar Lmt. v. Ernst & Young,* 185 Ariz. 493, 917 P.2d 222 (1996) and Restatement (Second) of Conflict of Laws requires that Delaware law governs service of process on corporations. Held that pursuant to Rules 4.1(k) and 4.2(h) A.R.Civ.P. service on a foreign corporation can be effected by serving me as "the current president of Helen Herman & Co., Inc." Held that the "Helen Herman & Co., Inc.'s" ownership of property and temporary use permit was sufficient minimum contacts with Arizona to give the state jurisdiction overt HHI and that HHI and I answered the complaint. Held also that maintenance of this suit does not offend "fair play and substantial justice." The court denied my claim that it lacked jurisdiction because it denied jurisdiction of the constitutional taking.

ARIZONA SUPERIOR COURT, October 18, 2000. JUDGE Borek granting Plaintiff's Motion for Summary Judgment. Citing *Boydston v. Strole Dev. Co.,* 193 Ariz. 47, 49 (1998) that I could not appear without an attorney, claiming that an SDA is the same as "act[ing] in behalf of Helen Herman when he submitted an Opposition to Plaintiff's Motion for Summary Judgment. The Opposition contained no affidavit

contradicting Plaintiff's affidavit supporting the market value of $55,000.00 although there is one unauthenticated attachment (Exhibit "K") to the Opposition that estimates the market value to be $75,000.00," and another from Arizona Market Research for $78,000. Both, the court claimed, were "unauthenticated." "If properly appraised and presented, [these appraisals would] clearly create a material issue. But "[h]aving failed to properly submit the Opposition," and the fact that I had earlier estimated the value of the property over a period of 50 years of rentals to be $19.5 million, which I withdrew in lieu of Davis's appraisal, the court would not consider them. The court clamed that my inability to obtain a lawyer was "inexcusable."

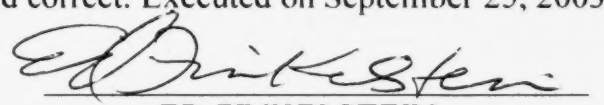
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE. Civ. A. No. 00-541-GMS Feb. 14, 2001. Court denied jurisdiction because "there is no conceivable way...[it] can exercise personal jurisdiction [in this case], finding, without giving a reason, that 28 U.S.C.S. 1391(c) does not support jurisdiction in this case.

SUPERIOR COURT, PIMA COUNTY. Jan. 2, 2000. JUDGMENT. "1. Plaintiff, under A.R.S. 12-1111 et seq. has authority to acquire the property..."2. The use for which the plaintiff seeks condemnation...is a public use. Based upon this finding by the Honorable Charles V. Harrington as set forth in the amended order for immediate possession dated December 16, 1999, the Court granted plaintiff immediate possession of the property. "3. Having reviewed the pleadings, motion for summary judgment, opposition, reply, affidavits and other documents in the clerk's file, and having heard the arguments of counsel, the intervenor and Mr. Finkelstein as set forth in the court's minute entry of October 18, 2000, this Court finds that the fair market value of the subject property...is $55,000.00, and this amount constitutes just compensation." Signed by Judge Borek.

Appendix Item B: **Verification of Derivative Action**

Pursuant to Rule 23.1 F.R.Civ.P., I hereby verify that (1) I was the only shareholder of Helen Herman, Inc. at the time of the City's constitutional taking and eminent domain proceedings; (2) this action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have; and (3) I consulted with the other directors of HHI who agreed that a stockholders derivative action was the only way available to us to represent the corporation's interests.

Pursuant to Rule 29(5)(c) and 28 U.S.C. Sec. 1746, I hereby declare under penalty of perjury that the foregoing is true and correct. Executed on September 25, 2003.



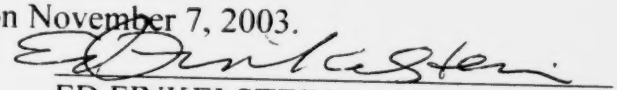
ED FINKELSTEIN

Appendix Item C **Proof of Service**

I hereby state that I served all of the Respondents named in this Petition by first-class mail on November 11, 2003, at the addresses listed below.

Pursuant to Rule 29(5)(c) and 28 U.S.C. Sec. 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on November 7, 2003.



ED FINKELSTEIN,
Petitioner

Gabroy, Rollman & Bosse, P.C.
3507 North Campbell Avenue, Suite 111
Tucson, Arizona 85719
Attorneys for the City of Tucson

Tom Burke, Esq., Civil Division
Office of the Pima County Attorney
32 North Stone Avenue, Suite 1500
Tucson, Arizona 85701-1412

William M Haile
P.O. Box 27813
Tucson, AZ 85726

Richard Auerbach, Auerbach &Auerbach
9630 East Morrill Way
Tucson, Arizona 85749
Attorney for the Florences

(2)

No. 03-743

Supreme Court, U.S.
FILED
JAN 2 - 2004
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 2003

ED FINKELSTEIN, *pro se*, HELEN HERMAN, INC.,
A Delaware Corporation,
Petitioners,

v

CITY OF TUCSON and PIMA COUNTY, Arizona,
WILLIAM HAILE, and M/M EDWARD FLORENCE
Respondents.

Petitioner's Supplemental Brief

On Petition for Writ of Certiorari

Ed Finkelstein
1411 N. 3rd Ave.
Tucson, AZ 85705
(520) 617-0656
Azexaminer@hotmail.com

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Pursuant to Rule 22.6, Petitioner Ed Finkelstein, acting *pro se* and in a stockholders' derivative capacity, files this Supplemental Brief calling attention to (1) the fact that the City of Tucson and Pima County improperly waived their right to file briefs in opposition and (2) other intervening matters. *Tiverton Bd. of License Comm'rs v. Pastore,* 469 U.S.---(1985); *Fusari v. Steinberg,* 419 U.S. 379, 391 (1975). ("Counsel have a continuing duty to inform the Court of any development which may conceivably affect the outcome" of the case.)

Respondents Admit the Facts and Issues in the Petition And Waive Their Right to File Briefs in This Case

The waivers[1] are improper and, by default, admit the facts and issues in the Petition. Supreme Court Rule 15 states:

> Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition *and not later.* Any defect of this sort in the proceedings below that does not go to the jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition. (Emphasis added.)

In fact, Respondents do not claim in their waivers that the opinion of the Arizona Court of Appeals is sufficient and does not warrant review.

> In order that the waiver will clearly be understood as based upon the lack of merit in the petition, the statement filed with the Court... should contain language to [that effect]. *Supreme Court Practice*, Sixth Ed., Robert L. Stern, *et al,* at 392. (Emphasis added.) (*Kotrich v. DuPage County,* 364 U.S. 475 (1960).

---

[1] I have not received a copy of the City's waiver. I assume it is similar to the County's, which I received on December 26th.

The constitutional taking, which the Court of Appeals tacitly acknowledged, but glossed over (Decision, par. 2), the Respondents' appalling violations of this Court's precedents and the Full Faith and Credit Clause, the ruthless deprivation of ***all*** due process, their RICO infractions, etc. are substantial federal questions warranting review.

Thus, since Respondents ask to reinstate their right to file briefs if the Court requests, their waivers are obviously motivated by a wait-and-see gamble based on the small percentage of petitions that are granted certiorari, *not on any perceived deficiency of the Petition itself.*

Thus, the waivers are a blatant misuse of procedure. For the Respondents cannot refute the Petition, just as they could not refute *any* fact, law or issue I cited below, so they resort to their *modus operandi* —deceit and circumvention of the rules, hubristically putting the burden on the Court to *force* them to answer.

In doing so, they expose their lack of professional and ethical fitness to practice before this Court and waive their right to file briefs under Rule 22.1. They also corroborate their RICO mentality.

Indeed, the Respondents appear *not* to have complied with Supreme Court Rules 5 and 9, which require them *first* to be admitted to practice before this Court before filing a document. I would prove with ample evidence that they are *un*qualified morally and professionally to practice before this Court.

A Veritable Coalition Insures That the State Apparatus Does Not Hold the Respondents Accountable

Since I filed my Petition, I have discovered a formidable supporting cast in the City's theater of operations:

(1) The State Board of Appraisers and the State Bar coddle miscreants. The Board summarily denied my fully-supported complaint against the City's appraiser for violating the Uniform Standards of Professional Appraisal Practice—the law—without requiring the appraiser to answer and without giving a reason;

The Bar holds that its unpublished standards allow "a large gray area in which attorneys may operate" and did not apply the Supreme Court Rules of Professional Conduct. Thus, the Bar refused to file a formal complaint against my attorney despite the fact that ***he admitted,*** by not denying in his answer to my complaint, that he committed forgery, collusion and fraud;

(2) The State Attorney General falsely claimed that its only responsibilities under the law are to defend agencies of the State;

(3) The State Office of Ombudsman for Private Property Rights has been abolished for condemnations by municipalities. The Office covers only condemnations by the State;

(4) The Tucson Police Department does not consider the fraudulent "Stipulation for Immediate Possession" to be a forgery because my attorney signed his name, not mine, on the document even though he signed it against my orders and he and the City represented to the court that it was a "consent between the parties."

(5) A city councilman, Steve Leal, turned down my suggestion that the City should have an ethics commission because he falsely argued that morality cannot be legislated.

Thus, a protective cocoon allows the City and County to *confidently* commit violations of constitutional property rights without redress.

Certiorari would wean the Respondents from harvesting fraud and due process abuse and end what clearly are RICO operations.

Finally, I inform the Court that I must be abroad from mid-January to mid-February and call attention to my new mailing address.

RESPECTFULLY SUBMITTED January 2, 2004.

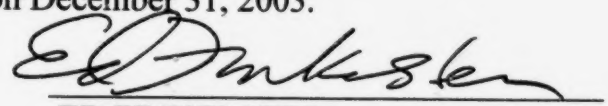
ED FINKELSTEIN
Petitioner *pro se*
And in a derivative capacity

Proof of Service

I hereby state that I served all of the Respondents named in this Petition by first-class mail on January 3, 2004, at the addresses listed below.

Pursuant to Rule 29(5)(c) and 28 U.S.C. Sec. 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2003.



ED FINKELSTEIN,
Petitioner

Gabroy, Rollman & Bosse, P.C.
3507 North Campbell Avenue, Suite 111
Tucson, Arizona 85719
Attorneys for the City of Tucson

Tom Burke, Esq.
Civil Division
Office of the Pima County Attorney
32 North Stone Avenue, Suite 1500
Tucson, Arizona 85701-1412

William M Haile
P.O. Box 27813
Tucson, Arizona 85726

Richard Auerbach, Esq.
Auerbach & Auerbach
9630 East Morrill Way
Tucson, Arizona 85749
Attorney for the Florences